exhausted, but that the state courts had never allowed an evidentiary hearing on the claim, and requested a federal evidentiary hearing. The habeas petition was filed well within the one year limitation period of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") – Brinson used less than *three months* of his AEDPA year.[7]

Several weeks after Brinson timely filed his federal habeas petition, Philadelphia District Attorney Lynne Abraham released to the public "a videotape entitled 'Jury Selection with Jack McMahon,'" Brinson's trial prosecutor, which had been recorded in 1986, the year of Brinson's trial. App. 11-12.[8] "This tape depicted a training session in which *McMahon advocated the use of peremptory challenges against African Americans.*" App. 12. As the Pennsylvania Supreme Court has observed, the practices taught by McMahon in the videotape "*flout constitutional principles in a highly flagrant manner.*" Commonwealth v. Basemore, 744 A.2d 717, 731 n.12 (Pa. 2000). For example:

> [T]he purpose of voir dire, namely, to select a fair and impartial jury, is denigrated as "ridiculous," in favor of the selection of jurors who will be

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[7]AEDPA was enacted in April 1996. At that time, however, Brinson's "properly filed" first PCRA petition was pending; thus, the AEDPA time was tolled under 28 U.S.C. § 2244(d)(2). The first PCRA proceedings remained pending until December 11, 1996. Brinson's habeas petition was docketed in the District Court just three months later, on March 10, 1997 (the actual filing date was even *before* March 10, when Brinson delivered the petition to prison authorities for mailing, see Nara v. Frank, 264 F.3d 310, 315 n.3 (3d Cir. 2001)).

[8]Abraham released the tape when McMahon was running against her for Philadelphia's elected District Attorney position. See, e.g., "D.A. Defends her Release of Videotape," Philadelphia Inquirer A01 (April 4, 1997); "Abraham's Actions Stun Political World," Philadelphia Inquirer A10, 1997 WL 8694021 (April 2, 1997).

> biased in favor of conviction; various racial and gender stereotypes are described and offered as reasons to discriminate in the selection of jurors; techniques for accomplishing such discrimination are described in detail, including the maintenance of a running tally of the race of the venire panel and the invention of pretextual reasons for exercising peremptory challenges; and a willingness to deceive trial courts to manipulate jury panels to these ends is also expressed.

Id., 744 A.2d at 729; see also id. at 729-32 (quoting McMahon tape).

On May 26, 1997, after the McMahon tape was released to the public, "Brinson filed a motion requesting that the District Court take judicial notice of the new evidence." App. 12; see Motion to Take Judicial Notice of Recent Public Information Concerning Jury Selection Discrimination (docket entry 9 in No. 97-1978) (SA Tab B). Brinson noted, as he had in his habeas petition, that the state courts had never allowed a hearing on the Batson claim; he asked, as he had in his habeas petition, for a federal hearing on the claim; and he suggested that the McMahon tape "would be important evidence" at such a hearing. He did *not*, however, seek to amend his habeas petition in any way.

On July 16, 1997, the Commonwealth filed a "Response to Petition for Writ of Habeas Corpus" ("July 1997 Response") (docket entry 10 in No. 97-1978), in which it asked that the habeas petition "be denied without prejudice and that [Brinson] be *required to return to state court* to litigate" a claim based upon the McMahon tape. Id. at 5.

The Commonwealth based its dismissal request on *misrepresentations* of (1) the

Batson claim in Brinson's habeas petition; and (2) Pennsylvania law:

(1) The Commonwealth suggested that the McMahon tape was part of the Batson claim pled in the petition, see July 1997 Response at 3-4, which was not true – the petition was filed before the tape was even released and Brinson never amended the petition to include tape-based allegations. Thus, the Commonwealth falsely asserted that part of the Batson claim in the petition had never been presented to the state courts.

(2) As to Pennsylvania law, the Commonwealth first (correctly) informed the District Court that the PCRA has a one year limitations period which had *already expired* for Brinson. See July 1997 Response at 4-5. The Commonwealth then asserted that state remedies might nevertheless be available because there is an exception to the PCRA's one year limitation period when "the petitioner alleges and proves that 'the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of reasonable diligence." Id. at 5 (quoting 42 Pa.C.S. § 9545(b)(1)(ii)). The Commonwealth, however, *failed to inform* the District Court that this § 9545(b)(1)(ii) exception applies, as a matter of jurisdiction, *only* when the petition invoking it is "filed within *60 days* of the date the claim could have been presented." 42 Pa.C.S. § 9545(b)(2). See *Petition* at 5-6 (describing PCRA time-bar). Since the McMahon tape was released on or about April 1, 1997, Brinson's 60 day window for filing a tape-based PCRA petition *had already closed 45 days before the Commonwealth filed its motion to dismiss.*

The District Court referred the case to a Magistrate, who recommended that the petition be dismissed without prejudice, as the Commonwealth requested. See Report & Recommendation (July 30, 1997) ("July 1997 R&R") (docket entry 12 in No. 97-1978). The Magistrate's recommendation was based upon the above-described misrepresentations in the Commonwealth's motion: (1) the Magistrate erroneously believed that the McMahon tape was one of the issues in the petition and, thus, that the petition contained a claim that had not been presented to the state courts; and (2) the Magistrate noted that a McMahon tape-based claim would fit into the § 9545(b)(1)(ii) exception to the PCRA's one year time-bar, but failed to recognize that there is a 60 day limit for filing such claims, which had already expired. See July 1997 R&R at 5-6.

On August 7, 1997, Brinson filed Objections to the Magistrates Report & Recommendation ("August 1997 Objections") (docket entry 13 in No. 97-1978) (SA Tab C). Brinson pointed out that he had already fairly presented his Batson claim to the state courts; he asserted that there were no state remedies available to him; he complained that a forced return to state court would cause him to be "buried ... in a nightmare of procedural ... rulings"; and he begged the District Court to allow merits review of his habeas petition, rather than dismiss it. August 1997 Objections at 4. Fearing that the District Court would nevertheless require a return to state court, Brinson in the alternative asked the District Court to take steps to ensure that he would quickly get state court review – he asked the District Court to "order the state court to appoint counsel

immediately"; to order the state court to "allow a full and fair hearing"; to hold the federal proceedings "in abeyance" during the state court proceedings; and to "check on the progress of the state proceedings every 60 days." August 1997 Objections at 5.

On September 22, 1997, the District Court adopted the Magistrate's report and recommendation, granted the Commonwealth's motion to dismiss, and required Brinson to return to state court. "Unfortunately, the District Court did not note that, by the time of its decision, the PCRA time limit for filing a claim based on newly discovered evidence – 60 days from the discovery of the evidence – had *already passed*." App. 12 (citation omitted). Moreover, the District Court failed to provide any of the procedural safeguards Brinson requested – e.g., his request for counsel to assist him in state court, his request that federal proceedings be held in abeyance, his request that the District Court monitor the progress of the state court proceedings. The District Court denied a certificate of appealability.[9]

D. The Erroneous, Futile Return to State Court

The District Court's dismissal, at the Commonwealth's demand, left Brinson in an untenable position. When a district court dismisses a *mixed* habeas petition on lack-of-exhaustion grounds, the petitioner normally has the option of *omitting the unexhausted*

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[9]At the time of the District Court's ruling, and until March 4, 2004, the Third Circuit did *not allow* district courts to hold federal habeas proceedings in abeyance during state court litigation. See Crews v. Horn, 360 F.3d 146 (3d Cir. 2004). Thus, the issue of whether the federal proceedings should have been stayed rather than dismissed was not "debatable" under then-current law.

claim(s) and proceeding in federal court on the exhausted claims. See Rose v. Lundy, 455 U.S. 509, 510 (1982). Brinson, however, did not have that option because his habeas petition *did not contain and never had contained any unexhausted claims* to omit. The Batson claim in his habeas petition was based *entirely on the trial record*, and had been *fully exhausted on direct appeal*. The District Court had required him to exhaust a McMahon tape-based claim that was *not in his petition*.

At the same time, any PCRA claim based upon the McMahon tape was *already untimely* under the PCRA because, "by the time of [the District Court's] decision, the PCRA time limit for filing [such a claim] ... had already passed." App. 12.

Moreover, before filing a new PCRA petition raising any type of Batson claim, "Brinson felt that he was required to comply with the so-called 'Spence rule,' see Commonwealth v. Spence, 534 Pa. 233, 627 A.2d 1176 (1993), and thus to identify the race of 'the veniremen who had been removed by the prosecution, the race of all the jurors who served, [and] the race of jurors acceptable to the Commonwealth who had been stricken by the defense.'" App. 12-13 (quoting Spence); see also Holloway v. Horn, 355 F.3d 707, 726-27 (3d Cir. 2004) (describing Spence rule). If a Pennsylvania PCRA petitioner does *not* make the detailed record required by the Spence rule, Pennsylvania's courts *refuse to even consider* whether a *prima facie* case exists under Batson. See Holloway, 355 F.3d at 727.

Brinson's trial counsel had established that prosecutor McMahon used thirteen of

his fourteen strikes against African Americans. Trial counsel, however, did *not* make the rest of the record required by the Spence rule.[10] Since the existing record did not establish all the information required by the Spence rule, and the state courts would not consider a Batson claim without this information, Brinson had to find some other way to establish the Spence rule record. And he had to do this while indigent, imprisoned and without counsel.

Placed in this impossible position and facing this overwhelming burden, Brinson diligently tried to make the record required by the Spence rule before filing his PCRA petition. He wrote to Philadelphia's Jury Commissioner in an attempt to secure evidence about the jury panel required by the Spence rule. See Petitioner's Traverse in Response to Respondent's Pleading ("Traverse") at 2 (docket entry 16 in No. 00-6115) (SA Tab D). The Jury Commissioner, however, responded that he could not help without a court order. Since the trial judge was deceased, the Jury Commissioner suggested that Brinson write to then-Administrative Judge John W. Herron for assistance. See Traverse at 2. After receiving this letter from the Jury Commissioner, Brinson immediately wrote to Judge Herron, again requesting information on the jury panel that would allow him to establish the record required by the Spence rule. Judge Herron, however, never responded to Brinson's inquiry. See Traverse at 2.

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[10]There was no reason for trial counsel to make the record required by the Spence rule, because the Pennsylvania Supreme Court did not invent and apply the Spence rule until long *after* Brinson's jury selection. See Holloway, 355 F.3d at 726-77.

Brinson, thwarted in his efforts to obtain the information needed to make the record required by the Spence rule, "wrote to many University asking the law school to assist [sic]." Traverse at 2. Eventually, a professor at the University of Pennsylvania, William C. Tyson, agreed to help. Since the trial record does not contain the information required by the Spence rule, Professor Tyson, like Brinson, was forced to seek other sources that might establish the Spence rule record. Eventually, by using a combination of the voir dire record, voter registration records, and statistical analysis, Professor Tyson was able to partially reconstruct the numbers needed to satisfy the Spence rule; using these numbers, Brinson's PCRA petition was filed in July 1998. App. 13.

In the PCRA court, the Commonwealth raised the 60 day time-bar argument that it had failed to provide to the federal court – the Commonwealth asserted that the PCRA petition was jurisdictionally time-barred under 42 Pa.C.S. § 9545(b) because it had not been filed within 60 days of the release of the McMahon tape. The PCRA court dismissed the petition as untimely, the Superior Court affirmed, Commonwealth v. Brinson, 761 A.2d 1243 (Pa.Super. 2000) (table), and the Pennsylvania Supreme Court denied allocatur on November 14, 2000, Commonwealth v. Brinson, 766 A.2d 1243 (Pa. 2000) (table).

E. The Renewed Federal Court Proceedings

1. District Court: On December 4, 2000, three weeks after the state court denial, Brinson again filed his *pro se* federal habeas petition, again raising the Batson claim and

the other claims that he had timely filed in March 1997.[11] The clerk gave the petition a new docket number, 00-6115, and assigned it to the same Judge as the original filing. See Brinson v. Vaughn, Civ. No. 00-6115 (Fullam, J.).

On June 7, 2001, the Commonwealth moved to dismiss the habeas petition in No. 00-6115 as untimely under AEDPA's one year limitation period, asserting that the AEDPA year ran while Brinson was pursuing the futile state court remedies that the Commonwealth had insisted upon and that the District Court required him to seek. Brinson, still *pro se*, responded to the Commonwealth's time-bar assertion in two ways.

First, Brinson moved in his earlier case, No. 97-1978, to amend the *original* habeas petition that he had timely filed in 1997, with the proposed amendment raising the same claims as the original, timely petition. See Motion for Leave to File Amended Habeas Corpus (docket entry 18 in No. 97-1978) (SA Tab E). Brinson argued that the amendment should be allowed under Federal Rule of Civil Procedure 15(a), which requires that leave to amend "shall be freely given when justice so requires," and that the amendment should "relate back" to the timely filed petition, under Rule 15(c)(2), because it raised the same claims. See Motion for Leave to File Amended Habeas Corpus at 6-7. The Commonwealth *did not oppose* Brinson's motion for leave to amend. The District Court *granted* Brinson's motion for leave to amend. See Order of July 20, 2001 (docket

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[11]The docket shows the petition was entered on December 4, 2000. Under the prisoner mailbox rule, the actual filing date was a few days earlier. See note 7, supra.

entry 19 in No. 97-1978) (SA Tab F). The Commonwealth *did not appeal* the District Court's order, and there has been no further action in No. 97-1978.

Second, Brinson argued, in No. 00-6115, for equitable tolling based upon the above-described history of the proceedings. The District Court agreed, finding on "the basis of the entire record," including the explanations in Brinson's "Traverse" for the timing of the state court filing, see part D, supra, that Brinson had "established a right to equitable tolling." App. 59, 61. The District Court found two factors created a particularly compelling case for tolling. First, the District Court recognized "that *it had erred in dismissing Brinson's first, timely petition.*" App. 13:

> The Batson issue had actually been presented to the state courts on direct appeal and in the first PCRA application. My conclusion that considerations of comity would best be served by permitting the state courts an opportunity to reconsider the issue in light of the recent disclosure of the McMahon tapes turned out to be unduly generous to the Commonwealth; petitioner's right to seek federal habeas relief should not be lost entirely, merely because of this Court's excessive deference to the state tribunals.

App. 60. Second, the District Court stated that, even if it had been appropriate to require state court proceedings, "it would have been preferable to *stay*, rather than *dismiss*, the first federal petition," and it was unfair to penalize Brinson for the fact that the Third Circuit did not then allow such "stay" orders. App. 60.

Having found the habeas petition timely under equitable tolling principles, the District Court denied the petition, including the Batson claim, on the merits. Brinson

appealed to the Third Circuit, and present counsel filed an Application for a Certificate of Appealability which was granted. Present counsel briefed and argued the appeal *pro bono*.

2. Court of Appeals: The Third Circuit panel (Scirica, C.J., Alito & Ambro, JJ.), in a unanimous opinion authored by Judge Alito, agreed with the District Court that *equitable tolling is appropriate* here. The Third Circuit first set forth the applicable law:

> It is settled that [AEDPA's] one-year statute of limitations ... is subject to equitable tolling, see Miller v. New Jersey State Dept. Of Corr., 145 F.3d 616, 618-19 (3d Cir. 1998), but that the doctrine should be invoked "sparingly." Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990). We have said that equitable tolling is proper when the party in question "has in some extraordinary way been prevented from asserting his or her rights." Brown v. Shannon, 322 F.3d 768, 773 (3d Cir. 2003). One such potentially extraordinary situation is where a court has misled a party regarding the steps that the party needs to take to preserve a claim. See, e.g., Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151 (1984) (referring to situation in which "the court has led the plaintiff to believe that she has done everything required of her"); Hallgren v. U.S. Dept. of Energy, 331 F.3d 588, 590 (8th Cir. 2003); Lambert v. United States, 44 F.3d 296, 299 (10th Cir. 1995); Rys v. U.S. Postal Serv., 886 F.2d 443, 447 (1st Cir. 1989). In this case, the District Court held that equitable tolling was justified on this ground.

App. 15; see also App. 15 (circumstances must be "sufficiently 'extraordinary' to justify equitable tolling"); App. 16 (court must "ensur[e] that the doctrine is indeed used 'sparingly' and is not employed to upset the strong concern for finality embodied in" habeas law).

Applying this well-established equitable tolling law, the Third Circuit concluded

that it "would sustain the District Court's [allowance of] equitable tolling under any of the standards used by other courts of appeals." App. 16:

> We conclude that the District Court's mistaken dismissal of Brinson's first petition prevented Brinson in a sufficiently extraordinary way from asserting his rights under the federal habeas statute. As the District Court ultimately recognized, Brinson had fully exhausted his Batson claim on direct appeal. It was therefore error for the District Court to dismiss his first federal habeas petition on the ground that this claim was not exhausted. In dismissing that petition, the District Court reasoned that Brinson's request for judicial notice of the McMahon tape transformed his Batson claim into one that differed from the claim raised on direct appeal, but this reasoning was flawed.
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> First, it is questionable whether Brinson's reliance on the McMahon tape fundamentally altered the previously exhausted claim because the tape merely confirmed the factual predicate of Brinson's Batson claim without changing its legal basis. See Vasquez v. Hillery, 474 U.S. 254, 258 (1986); Stevens v. Del. Corr. Ctr., 295 F.3d 361, 369 (3d Cir. 2002); Landano v. Rafferty, 897 F.2d 661, 673 (3d Cir. 1990). Second, as we explain in part III of this opinion, without the tape, Brinson had a meritorious claim that his trial attorney established a *prima facie* case under Batson and that the state courts violated Batson by failing to move on to the second and third steps of the Batson inquiry. Under these circumstances, the District Court, at a minimum, should have given Brinson the option of going forward with the precise claim that was advanced on direct appeal. See Rose v. Lundy, 455 U.S. 509, 510 (1982) (when petition is "mixed," petitioner must be given "choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court"). Instead, the District Court relegated Brinson to another round of state court litigation that was bound to fail because the 60-day period for raising a claim founded on newly discovered evidence had already passed.

App. 16-17 (footnote omitted).

The Third Circuit considered and rejected the Commonwealth's argument "that Brinson did not act with the requisite 'reasonable diligence' because he was allegedly dilatory in filing his second PCRA petition." App. 17. The Commonwealth had urged the Third Circuit to impose a *per se* rule that "Brinson did not exhibit 'reasonable diligence' because he did not file his second PCRA petition within 30 or 60 days after the District Court's dismissal." App. 17. The Third Circuit found, however, that this rigid, *per se* rule was inappropriate under the circumstances of this case, and that "the District Court did not err in equitably tolling the statute of limitations." App. 18.

Turning to the merits, the Third Circuit easily found a *prima facie* case under Batson. App. 22-24. In making this finding, the Third Circuit *did not consider the McMahon tape* at all. Instead, it limited itself to the Batson claim Brinson raised in his timely 1997 federal habeas petition, based upon the trial record that was before the state courts when they denied the Batson claim at trial and on direct appeal – e.g., McMahon's "stark pattern" of using thirteen of his fourteen strikes against African Americans; his "vague responses" when the Batson claim was raised by defense counsel; his failure to give any reasons for any of his strikes when asked to do so; the fact that his "number one" response was that Batson should not be applied and that his jury selection should be judged by pre-Batson standards that allowed intentional discrimination; his assertion that Batson should be limited to its facts and his misleading statement of those "facts," which suggest his fear of being judged by Batson's actual standards; his false claim that he had

"accepted" one African American struck by the defense; his assertion – about an African American who had been the victim of gun-related crimes, had very strong anti-crime views and was a firm supporter of capital punishment – that he was "willing to accept him *despite him being black*"; and his claim of lapsed memory when the Batson issue was argued post-trial, which is particularly suspicious because he was on notice from the pre-trial proceedings that he would have to answer to the Batson allegations. See App. 23-24; Counter-Statement of the Case § A. The Commonwealth *does not contest* the Third Circuit's *prima facie* case finding.

Applying 28 U.S.C. § 2254(d) to the Batson claim, as required by AEDPA, the Third Circuit found that "the explanations given by the state trial and appellate courts were all 'contrary to' Batson, or at least represented unreasonable application of that precedent," App. 19 – e.g., the trial judge's ruling that Batson did *not apply* in Pennsylvania; the trial judge's application of pre-Batson law that *allowed intentional discrimination*; the subsequent state court judge's deference to a non-existent no-discrimination finding by the trial judge; the Superior Court's *per se* rule that there can *never* be a *prima facie* case when defendant, victim and witnesses are all African American;[12] the Superior Court's patently erroneous statement that the prosecutor did not strike *any* African Americans; the Superior Court's holding that there could not be

[12]Moreover, as stated above, many witnesses actually were *not* African American.

a *prima facie* case because "the defense struck blacks";[13] and the Superior Court's holding that there could not be a *prima facie* case because some African Americans were selected. See App. 19-24; Counter-Statement of the Case § A. The Commonwealth *does not contest* the Third Circuit's ruling that the state court decision was "contrary to" and/or an "unreasonable application of" Batson.

Having found the habeas petition timely, and having found a *prima facie* case of intentional discrimination under Batson, the Third Circuit remanded to the District Court for an evidentiary hearing at which "the Commonwealth should be given the opportunity to provide legitimate reasons for any strikes against African Americans." App. 24-25.

The Commonwealth sought *en banc* rehearing of the panel's unanimous decision, which was denied without comment. The Commonwealth now seeks this Court's certiorari review.

REASONS FOR DENYING THE WRIT

A writ of certiorari is "granted only for compelling reasons." Supreme Court Rule 10. This Court's certiorari jurisdiction is "exercised sparingly, and only in cases of peculiar gravity and general importance." Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916). There is no reason to grant the writ here.

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[13]Moreover, as stated above, the defense struck just one "black," not *blacks* (plural).

I. THIS COURT SHOULD DENY CERTIORARI BECAUSE OF THE INTERLOCUTORY NATURE OF THE THIRD CIRCUIT'S JUDGMENT.

The Third Circuit did *not* grant habeas relief, nor did it order the District Court to grant relief. Instead, it merely remanded to the District Court for an evidentiary hearing. Under these circumstances, where the judgment is interlocutory in nature, this Court generally does not grant certiorari.[14] There is no reason to deviate from that general rule here. Certiorari should be denied.

II. THIS COURT SHOULD DENY CERTIORARI BECAUSE BRINSON'S HABEAS PETITION IS TIMELY EVEN UNDER THE COMMONWEALTH'S THEORY.

Certiorari should be denied because Brinson's federal habeas petition is timely even *under the Commonwealth's own theory* of equitable tolling.

The Commonwealth has never contested that equitable tolling is appropriate for the times during which Brinson had proceedings pending in either state or federal court. Thus, the only periods that could possibly make Brinson's federal habeas petition untimely are those during which nothing was pending in any court. Brinson's out-of-court times are as follows:

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[14]See Virginia Military Inst. v. United States, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari) (denying certiorari where Court of Appeals remanded for further proceedings in District Court; "We generally await final judgment in the lower courts before exercising our certiorari jurisdiction." (citing authorities)); Locomotive Firemen v. Bangor & Aroostook R. Co., 389 U.S. 327, 328 (1967) (per curiam) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for a writ of certiorari is denied."); Hamilton-Brown, 240 U.S. at 258 ("except in extraordinary cases, the writ is not issued until final decree").

12/11/96 (first PCRA denied) until 3/10/97 (federal habeas filed) = 89 days

9/22/97 (federal habeas dismissed) until 7/30/98 (second PCRA filed) = 311 days

11/14/00 (second PCRA denied) until 12/4/00 (federal habeas refiled) = 20 days

Thus, Brinson's total time out-of-court is 420 days.[15]

The Commonwealth told the Third Circuit that it is appropriate to allow *60 days of equitable tolling* during Brinson's out-of-court time. See Counter-Statement of the Case § E.2; App. 17-18. In this Court, the Commonwealth makes the same allowance for 60 days of out-of-court tolling. See *Petition* at 16. Since Brinson's total out-of-court time is *420 days*, and the Commonwealth allows *60 days* of equitable tolling, Brinson used just *360 days without tolling* and, thus, is *timely* even under the Commonwealth's own theory of equitable tolling.

This Court does not use its certiorari jurisdiction to resolve issues that have no practical consequence for the parties. Indeed, this Court *lacks jurisdiction* under Article III of the United States Constitution to decide such matters. Certiorari should be denied.

III. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE TIMELINESS OF BRINSON'S HABEAS PETITION IS RES JUDICATA.

As set forth in the Counter-Statement of the Case § E.1, Brinson had a two-fold response to the Commonwealth's AEDPA time-bar argument. In addition to arguing for

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[15]In fact, Brinson's total out-of-court time is even *less* than 420 days because the 3/10/97 and 12/4/00 dates are when his petition was entered on the docket, rather than the earlier dates when he delivered the petition to prison authorities for mailing. See note 7, supra.

equitable tolling in the instant case, No. 00-6115, Brinson also moved to amend his original, timely filed habeas petition in No. 97-1978, asserting that leave to amend was appropriate under Federal Rule of Civil Procedure 15(a), and that the amendment "related back" to the original, timely, filing date under Rule 15(c)(2). The Commonwealth did not oppose the motion to amend or Brinson's argument that the amendment was timely because it "related back" to the original filing. The District Court *allowed the amendment.* The Commonwealth did not appeal, and does not present any argument in its *Petition* regarding the propriety of the District Court's grant of leave to amend in No. 97-1978.

Thus, it is undisputed that there is a *timely* habeas petition pending in No. 97-1978, raising exactly the same claims that are raised in the instant case. This timeliness ruling in No. 97-1978, which has never been contested by the Commonwealth, means that the Commonwealth's time-bar argument in the instant case is barred by principles of res judicata. See Wright, Miller & Cooper, 18A FED. PRAC. & PROC. JURIS.2d § 4441 (Res Judicata: Statutes of Limitations) (timeliness ruling in one case is res judicata for timeliness of second case involving same facts). Under these circumstances, certiorari should be denied.

IV. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE COMMONWEALTH'S QUARREL IS WITH THE THIRD CIRCUIT'S APPLICATION OF A PROPERLY STATED RULE OF LAW TO THE FACTS.

The Commonwealth's real quarrel is with the lower courts' application of settled

law to the facts of this case, and with the lower courts' determinations of those facts.

A. The Commonwealth claims that the Third Circuit "explicitly refused to consider whether [Brinson] had acted with 'reasonable diligence.'" *Petition* at 8 (emphasis omitted). But, as set forth below, what the Third Circuit actually "explicitly refused" to accept was the Commonwealth's proposed *per se* rule that diligence required a return to state court within 60 days. While refusing to adopt the Commonwealth's *per se* rule, the Third Circuit applied well-established equitable tolling law to the specific facts of this case.

The Third Circuit first set forth well-established equitable tolling law, repeatedly stressing that equitable tolling is only "*sparingly*" allowed under "*extraordinary circumstances*." See Counter-Statement of the Case § E.2 (quoting Third Circuit opinion, App. 15-16). Moreover, *every equitable tolling case* cited by the Third Circuit – this Court's decisions in Irwin and Baldwin; the Third Circuit's prior decisions in Miller and Brown; and other Circuits' decisions in Hallgren, Lambert and Rys – emphasizes that equitable tolling is available only to a "*diligent*" litigant.[16] Thus, the Third Circuit plainly

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[16]See Irwin, 498 U.S. at 96 ("Federal courts have typically extended equitable relief only sparingly. ... We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights."); Baldwin, 466 U.S. at 151 ("One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence."); Miller, 145 F.3d at 618-19 ("The petitioner must show that he or she exercised reasonable diligence in investigating and bringing [the] claims. Mere excusable neglect is not sufficient." (citations and quotation marks omitted)); Brown, 322 F.3d at 773 ("[T]o be entitled to equitable tolling, [t]he petitioner must show that he or she exercised reasonable diligence in investigating and bringing

recognized that equitable tolling is only "sparingly" allowed under "extraordinary circumstances" when the petitioner has been "diligent."[17]

After properly outlining the law of equitable tolling, the Third Circuit described the Commonwealth's argument against equitable tolling in this case: "The Commonwealth contends that Brinson did not act with the requisite 'reasonable

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[the] claims. Mere excusable neglect is not sufficient." (citations and quotation marks omitted)); Hallgren, 331 F.3d at 591 ("Equitable tolling is not an excuse to be invoked by those failing to exercise reasonable diligence."); Lambert, 44 F.3d at 299 & n.1 (stressing "due diligence" requirement); Rys, 886 F.2d at 446-47 ("One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence."; denying equitable tolling because court was "not convinced that [plaintiff] acted with the utmost diligence" (citations and quotation marks omitted)).

[17]The Third Circuit has repeatedly said the same thing in other habeas cases, and has denied equitable tolling when it found that the petitioner was *not* "diligent" during exhaustion of state remedies. See, e.g., Pace v. Vaughn, 2003 WL 21754982, *1 (3d Cir. July 30, 2003) (unpublished, text on Westlaw) (denying equitable tolling for time spent exhausting state remedies where petitioner was not diligent; tolling allowed only under "extraordinary" circumstances and when "petitioner has demonstrated that he exercised reasonable diligence in investigating and bringing [the] claims" (quotation marks omitted)), aff'd, Pace v. DiGuglielmo, 125 S.Ct. 1807 (2005); LaCava v. Kyler, 398 F.3d 271, 272, 276, 277 (3d Cir. 2005) (habeas petitioner's "twenty-one month period of passivity [during exhaustion] precludes a finding of due diligence for equitable tolling"; equitable tolling allowed only in "rare situation" when prisoner shows "extraordinary circumstances ... *and* the prisoner has exercised reasonable diligence" (emphasis in original); diligence "obligation does not pertain solely to the filing of the federal habeas petition, rather it is an obligation that exists during the period [the petitioner] is exhausting state court remedies as well"); Jones v. Morton, 195 F.3d 153, 159-60 (3d Cir. 1999) (same analysis; denying equitable tolling where petitioner "made no showing that he that he exercised reasonable diligence in satisfying the exhaustion requirement" after his habeas petition was dismissed without prejudice (quotation marks omitted)).

diligence' ... because he did not file his second PCRA petition within 30 or 60 days after the District Court's dismissal of the first federal petition." App. 17.[18] The Third Circuit then rejected the Commonwealth's *per se* rule, which would never allow more than 60 days of equitable tolling no matter what the circumstances, and held that, under the circumstances of this case, "the District Court did not err in equitably tolling the statute of limitations." App. 18.

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[18]The Commonwealth took the 30 day figure from Crews v. Horn, 360 F.3d 146 (3d Cir. 2004), which "held that, where a District Court stays a mixed petition so that the petitioner can exhaust unexhausted claims, the petitioner must file in the state court within 30 days after the entry of the stay." App. 17-18. But Crews' 30-day rule is premised on four assumptions, none of which apply here: the habeas petition is "mixed"; federal proceedings are held in suspense; the petitioner is told to file in state court within 30 days; and the petitioner is warned that failure to file within 30 days could result in dismissal of his federal proceedings. See id., 360 F.3d at 154. Here, Brinson's petition was *not* mixed; the District Court did not hold the federal proceedings in suspense; the District Court did not tell Brinson to return to state court within any specific time; and the District Court did not warn Brinson that failure to return to state court within a specific time could result in dismissal. Moreover, Crews' 30-day rule is the time that is "normally" deemed "reasonable." Id., 360 F.3d at 154. Here, despite Brinson's diligent efforts, more time was required, as stated above. If the federal habeas proceedings had been held in suspense, as Crews requires, Brinson could have sought leave from the District Court for additional time, based on the specific facts of this case.

The Commonwealth took the 60 day figure from Commonwealth v. Lark, 746 A.2d 585 (Pa. 2000), which "held that, when a ground for filing a second PCRA petition ... arises while a previous PCRA action is still pending, the second petition is timely if it is filed within 60 days after the final resolution of the previous PCRA action." App. 18. But Lark's 60 day rule does *not apply* when, as here, the already "pending" action is a federal habeas proceeding, rather than a prior PCRA proceeding. See Commonwealth v. Whitney, 817 A.2d 473, 477 (Pa. 2003). Moreover, Lark's rigid 60-day rule has nothing to do with equitable tolling – it is a state court jurisdictional requirement imposed by the PCRA statute.

In short, the Third Circuit understands the law of equitable tolling perfectly well, fairly stated that law in this case, applied it to the facts, and rejected the Commonwealth's argument. The Commonwealth dislikes the outcome, but that is not grounds for granting certiorari. See Supreme Court Rule 10 ("certiorari is rarely granted when the asserted error consists of ... the misapplication of a properly stated rule of law").[19]

B. At the same time that the Commonwealth claims the Third Circuit did not consider "diligence," it also claims that Brinson tricked the District Court and Third Circuit into believing he was diligent – i.e., the Commonwealth disputes the facts that were found and relied upon by the lower courts.

As set forth above, Brinson explained to the District Court and Third Circuit that one reason it took him some time to get back into state court was that he needed to compile the "Spence rule" numbers required by Pennsylvania's state court pleading rules for Batson claims; he unsuccessfully tried to do this while incarcerated and

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[19]The Commonwealth also asks this Court to decide if it is an "extraordinary circumstance" when a federal habeas petition "is dismissed by a federal district court because some or all of the claims therein are unexhausted." See *Petition* at 20-22. But the Third Circuit *did not hold* that dismissal of an unexhausted petition is an "extraordinary circumstance." Instead, it held that the "*mistaken dismissal*" of a *fully exhausted* petition that states a *prima facie* case under Batson, without giving the petitioner the opportunity to proceed on the exhausted claim, is the type of "extraordinary circumstance" that may justify equitable tolling. See App. 16-17 (quoted in Counter-Statement of the Case § E.2, supra). This Court does not grant certiorari to decide issues that were not presented to or decided in the lower court.

unrepresented; he eventually obtained assistance from a law professor who was able to reconstruct some of the Spence rule information; and he filed soon thereafter. See Counter-Statement of the Case §§ D-E. The District Court credited this explanation, see App. 59 (District Court relies upon Brinson's Traverse and Objections, which describe his attempts to compile Spence rule information), as did the Third Circuit, see App. 12-13.

The Commonwealth says it "is not even true" that Brinson was gathering Spence rule information; that the "truth is, Brinson was not collecting" Spence rule evidence; that Brinson's second PCRA petition "did not present any new 'Spence' evidence to the state courts" but, instead, presented only "a statistical argument based on McMahon's *other* cases"; and that the "*Third Circuit seriously mischaracterize[d]*" the record when it found facts contrary to the Commonwealth's claims. *Petition* at 17-19 & n.4 (emphasis in *Petition*).

In short, the Commonwealth claims that Brinson pulled the wool over the lower courts' eyes in a "classic example of misdirection," and that the lower courts made a *factual error* when they "uncritically accepted" Brinson's explanation. *Petition* at 16, 19 n.4. This plainly is *not* grounds for granting certiorari. See Supreme Court Rule 10 ("certiorari is rarely granted when the asserted error consists of erroneous factual findings").

Moreover, the Commonwealth is simply wrong when it says Brinson was not really gathering Spence rule information. The Commonwealth bases its assertion on

carefully selected excerpts from Brinson's 1998 PCRA Petition, see App. 73-75, which proffer information regarding McMahon's jury selection in *other* cases. This appearance of other-case-only allegations, however, is created by the Commonwealth's *misleading excerpting*. In fact, Brinson developed and pled in the 1998 PCRA petition *both* other-case evidence *and* evidence about McMahon's strikes *in this case*.

The 1998 PCRA petition plainly states that Petitioner relied upon: "(1) Mr. McMahon's peremptory challenges *at Petitioner's trial*; (2) the McMahon tape; *and* (3) statistics regarding Mr. McMahon's exercise of peremptory challenges in other cases." 1998 PCRA Petition at 8; see also id. at 11 (claim relies upon "statistics regarding Mr. McMahon's exercise of peremptory challenges *in Petitioner's trial*"; the McMahon tape; *and* "statistics regarding Mr. McMahon's exercise of peremptory challenges in other cases"). The 1998 PCRA Petition also makes clear that the "statistical study" upon which it relies was a "a study of sixteen of Mr. McMahon's jury trials, *including Petitioner's case*." Id. at 24.[20]

In describing the *prima facie* case, the 1998 PCRA Petition proffers the same three above-described factors. See id. at 15-25. In particular, regarding "McMahon's Peremptory Challenges *at Petitioner's Trial*," id. at 15 (capitalization in original), the

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[20]The racial information about Brinson's trial and the other cases was developed by "obtaining the name of, and identifying identification regarding, the venirepersons in each of the cases in the statistical sample and then determining the race of these venirepersons from voter registration data." 1998 PCRA Petition at 9.

1998 PCRA Petition uses the study of jury selection *in this case* to proffer: the races of all persons whom McMahon had an opportunity to strike *in this case* (i.e., those who were not excluded for cause or struck by the defense before McMahon had an opportunity to strike or accept); the races of all persons whom McMahon did strike *in this case*; and the races of all fourteen selected jurors and alternates *in this case*. See id. at 17. Thus, the Commonwealth's claim that Brinson tricked the lower courts, in addition to being unworthy of certiorari review, is patently false.[21]

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[21]The Commonwealth makes several other erroneous and misleading assertions about the facts and circumstances of this case. For example, the Commonwealth says the Third Circuit allowed equitable tolling for a "*second* federal habeas petition." *Petition* at 8. But under the well-established law of this Court and the Third Circuit, Brinson's current petition, filed after his prior filing was dismissed without prejudice, is a *first* petition. See Slack v. McDaniel, 529 U.S. 473, 488 (2000); Christy v. Horn, 115 F.3d 201, 208 (3d Cir. 1997).

The Commonwealth says that when Brinson's timely federal habeas petition was dismissed without prejudice in 1997, Brinson was "warned by the district court that there was a potential time-bar problem." *Petition* at 19. This is false. Neither the District Court nor the Commonwealth ever even hinted that dismissal would create a "potential time-bar problem." To the contrary, the Commonwealth's motion to dismiss the habeas petition without prejudice plainly suggested that Brinson would receive federal habeas review after his state court litigation. See, e.g., July 1997 Response at 4-5 ("Respondents deny that petitioner is entitled to federal habeas review *at this time*. ... The interests of comity and federalism require that [state] remedy be pursued *before federal review will be appropriate*. ... [T]he present petition should be dismissed as *premature*.").

The Commonwealth suggests that Brinson was somehow remiss for not developing the "Spence rule" record at trial or on direct appeal. See *Petition* at 18. But the Pennsylvania Supreme Court did not invent and apply the Spence rule until long *after* Brinson's jury selection and direct appeal were over. See Holloway, 355 F.3d at 726-77 (Pennsylvania Supreme Court first stated the Spence rule in 1993 and first "fully explained" it in 1995).

C. The Third Circuit understands the law of equitable tolling and applied it to the facts of this case. The Commonwealth's quarrel is with the Third Circuit's view of the facts and the outcome of its application of settled law to those facts. Certiorari should be denied.

V. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE ISSUE THE COMMONWEALTH PRESENTS IS UNLIKELY TO RECUR.

The Commonwealth seeks certiorari on an issue that is unlikely to arise again. If similar habeas proceedings were initiated today they would unfold very differently, albeit with the same ultimate result, and would *not* present the issue on which the Commonwealth seeks review.

Suppose that, under current law: (1) a prisoner timely files a fully exhausted habeas petition, as Brinson did in 1997; (2) after the petition is filed, the state releases new evidence relevant to one of the claims in the petition, as the Commonwealth did here; and (3) the prisoner then asks the district court to take judicial notice of the new evidence and points out that the new evidence will be relevant at an evidentiary hearing on the already exhausted claim, as happened here. Under these circumstances, the proper course of action is quite clear, and it has *nothing to do with* the issue the Commonwealth wants reviewed.

First, the district court must decide if consideration of the new evidence requires that the habeas petition be amended. Here, it is clear that *no amendment was needed* because, as the Third Circuit found and the Commonwealth does not dispute: the *already*

exhausted facts pled in the petition establish a *prima facie* case under Batson; the state courts' failure to find a *prima facie* case is contrary to and/or an unreasonable application of Batson; and, thus, an evidentiary hearing is required at which the prosecutor may give race-neutral reasons for his strikes (Batson step-two) and at which the court will make an ultimate finding of intentional discrimination *vel non* (Batson step-three). Since a hearing is required *without* the McMahon tape, there plainly is no reason to require amendment of the petition to include it.[22]

Second, assuming that the petition must be amended, the timeliness of any proposed amendment would be governed by this Court's recent decision in Mayle v. Felix, 125 S.Ct. 2562 (2005). Here, if amendment had been needed or sought, which it was not, it plainly would have been timely, since the McMahon tape "relates back" to the

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[22]Moreover, the *tape may be relevant and properly introduced at the hearing* even though it is not part of the petition. If McMahon gives race-neutral reasons at step-two, the tape will be relevant at *step-three*, as rebuttal to those proffered reasons. For example, the tape would be relevant at step-three because McMahon on the tape urges "*invention of pretextual reasons*" for race-based strikes, Basemore, 744 A.2d at 729; the tape would be relevant at step-three if McMahon claimed he had no motive to strike African Americans because the case was not particularly racially charged, since McMahon on the tape urges race-based jury selection in *every case*, see Transcript of McMahon tape at 60-62 ("[D]on't design a jury for a particular case. ... [Y]our goal is the same regardless of what kind of case you have. ... You pick the same jury. I don't care if it's a black, white, Puerto Rican, Chinese or what. You pick the same jury."); the tape would be relevant at step-three if McMahon claimed that selection of three African Americans showed a lack of intent to discriminate, since McMahon on the tape says a jury with three African Americans is ideal, see Transcript of McMahon tape at 59 (quoted in Basemore at 730) ("I've always felt that a jury of like eight whites and four blacks is a great jury, or nine and three").

Batson claim that was already exhausted and pled in the petition. See Mayle, 125 S.Ct. at 2572.[23]

Third, if amendment is needed and allowed, the district court must then decide if the resulting amended petition is "mixed," i.e., if the amendment added an unexhausted claim. Here, if amendment had been needed, sought and allowed, which it was not, it would *not* have created a "mixed" petition, for two independent reasons found by the Third Circuit: (1) no state court remedies were available because the 60 days allowed by the PCRA had already expired before the District Court ruled, e.g., App. 12, 17; and/or (2) the McMahon tape did not "fundamentally alter[] the previously exhausted claim because the tape merely confirmed the factual predicate of Brinson's Batson claim without changing its legal basis." App. 16-17 (citing Vasquez v. Hillery, 474 U.S. 254, 258 (1986) and similar Third Circuit precedent).

Finally, assuming there is an amendment to the petition, and that the amendment makes the petition mixed, neither of which occurred here, the district court under these circumstances would then have to decide if it should *hold the federal habeas proceedings in suspense*, rather than dismiss without prejudice, while state court remedies are exhausted. See Rhines v. Weber, 125 S.Ct. 1528 (2005). Here, the District Court and

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[23]Moreover, a McMahon tape-based claim would have been timely even if deemed to be an altogether new claim. See 28 U.S.C. § 2244(d)(1)(D) (claim timely if filed within one year of "the date on which the factual predicate of the claim ... could have been discovered through the exercise of due diligence").

Third Circuit found, and the Commonwealth does not contest, that Brinson's federal proceedings would have been stayed under Rhines and under Third Circuit law as it has existed since Crews v. Horn, 360 F.3d 146 (3d Cir. 2004) was decided in March 2004. See App. 59-60 (District Court); App. 14 (Third Circuit).

Thus, under current practice, this case would unfold very differently from the way that it did, and the issues that the Commonwealth wants this Court to review would not arise. Instead, the issues would involve application of the rules for amendments and "stay" orders, as set forth in this Court's recent decisions such as Mayle and Rhines. Moreover, the ultimate outcome here – a timely habeas petition – would be required by current law. This Court does not use its rarely granted certiorari jurisdiction to solve yesterday's problems. Certiorari should be denied.

CONCLUSION

For the reasons stated above, certiorari should be denied.

Respectfully submitted,

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NO. 05-25

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID DiGUGLIELMO; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioners,

v.

CURTIS BRINSON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONERS' REPLY

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ARGUMENT IN REPLY

In the Petition for Writ of *Certiorari*, petitioners explained that the Third Circuit was wrong to equitably toll the habeas deadline without even considering whether Brinson acted with reasonable diligence. Petitioners also explained that the Third Circuit's error contradicted decisions from other Circuits, as well as three intervening decisions from this Court. In his response, Brinson raises a host of arguments about tangential matters, but he does not dispute the central point: Federal courts must always consider diligence as a prerequisite to equitable tolling. At the very least, then, this matter should be remanded for application of this basic principle.

Petitioners offer the following argument in reply; the issues are numbered in the order that Brinson has presented them.

I. The timeliness issue is appropriate for immediate review: It is squarely presented, it is separable from the rest of the case, and it is dispositive.

Brinson first argues that this Court should not grant the writ because the matter is not final. Response at 22 & n.14. But this Court often reviews matters that are interlocutory in nature, where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." Stern, Gressman, Shapiro, & Geller, *Supreme Court Practice* 259 (8th ed. 2002) (citing cases). In fact, this Court often grants certiorari in non-final habeas matters that pose an important timing issue, including two cases near the end of last term. See Mayle v. Felix, 125 S. Ct. 2562, 2573-74 (2005) (amendments to habeas petition that implicate new facts or law cannot "relate back" to

original filing date when one-year habeas deadline has passed); Bell v. Thompson, 125 S. Ct. 2825, 2831-32 (2005) (Court of Appeals abused discretion by staying mandate, issuing amended opinion, and remanding for hearing five months after Supreme Court denied rehearing of *certiorari* denial).

Brinson's case, like Mayle and Bell, presents an important and clear-cut timeliness issue that is ripe for immediate review. It is obviously separate from the merits of Brinson's jury discrimination claim, and it is a threshold question – if Brinson's habeas petition is time-barred, then there will be no need for further proceedings. On the other hand, if this Court does not grant *certiorari*, this decades-old litigation will continue into the foreseeable future, despite the Third Circuit's clear mistake in failing to apply the habeas deadline as required by law.

II. Brinson's petition is untimely, because he filed it after the deadline and cannot demonstrate that he qualifies for equitable tolling.

Brinson's next argument consists of an odd (and plainly incorrect) re-calculation of the habeas deadline. He adds up all of his "out-of-court" time, and measures it against the AEDPA[1] 365-day time limit, plus an extra sixty days of tolling for going back-and-forth between federal and state court. Not surprisingly, he announces he has met this new, imaginary deadline by five days. Perhaps more surprisingly, he declares that this calculation is consistent with the Commonwealth's theory of the time limit. Response at 22-23.

[1] The Anti-Terrorism and Effective Death Penalty Act of 1996, which included among its provisions the one-year habeas deadline.

But this calculation is not consistent with the Commonwealth's theory; nor is it consistent with the habeas statute, or this Court's precedent. The application of the habeas deadline, as defined by 28 U.S.C. §§ 2244(d)(1) and (2), is straightforward. Brinson's judgment became final before the passage of the AEDPA, so the one-year "grace period" applies,[2] and normally that would mean that the one-year habeas deadline would run from AEDPA's effective date, or April 24, 1996. On that date, however, Brinson was litigating a "properly filed" petition for state collateral review, so the time was tolled while that state petition was pending. 28 U.S.C. § 2244(d)(2). Brinson's state collateral petition ceased to be pending on December 11, 1996, when the Pennsylvania Supreme Court affirmed the denial of collateral relief, and so the tolling defined by § 2254(d)(2) ended on that date, and the one-year habeas deadline began to run. The deadline was *not* tolled by Brinson's first federal habeas petition – that is settled law. Duncan v. Walker, 533 U.S. 167, 181-82 (2001). That means that the AEDPA deadline passed on December 10, 1997, and Brinson's second habeas petition – the subject of this appeal – was late by several years.

Brinson's confusion arises because he does not understand the difference between *statutory* tolling (tolling specifically authorized by the statute during pendency of "properly filed" state collateral petitions) and *equitable*

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[2] The Courts of Appeals, including the Third Circuit, have uniformly adopted a one-year grace period for criminal judgments that became final before AEDPA's effective date. See Duncan v. Walker, 533 U.S. 167, 183 & n.1 (2001) (Stevens, J., concurring in part and concurring in the judgment) (collecting "grace period" cases).

tolling. To qualify for equitable tolling – assuming there is such a thing – Brinson must at least show that he acted diligently, but was nevertheless prevented from filing sooner by some extraordinary circumstance. Pace v. Diguglielmo, 125 S. Ct. 1807, 1814 (2005).

Equitable tolling is the only issue here, because there is no question but that Brinson otherwise missed the deadline. In fact, the issue here is even more narrow: This case now turns on whether Brinson has a sufficient explanation for his ten-month delay between the dismissal of his 1997 federal habeas petition, and his next filing in state court. Brinson tries to change the subject, by complaining that he was treated unfairly, that he was misled, that he should have been warned about the possibility of untimeliness. Petitioners disagree that Brinson was unfairly treated, but even assuming that he was, this is no longer the issue. In September of 1997, the federal district court dismissed Brinson's first habeas petition without prejudice, so that he could exhaust his latest claim in state court. He did not file in state court until the end of July, 1998. This long delay matters, and Brinson is not entitled to equitable tolling unless he can show that he acted with diligence and was nevertheless prevented from filing earlier. But there is no plausible way to equitably toll all of this time.

III. The timeliness of the petition is not "res judicata" by virtue of an improper, duplicative habeas petition.

According to Brinson, his 1997 federal habeas petition, which was dismissed that same year, was later re-activated and amended in 2001 without opposition or appeal from the Commonwealth, and these amendments are therefore timely by virtue of "res judicata." Response at 23-

24. This is a new argument, not considered by the Third Circuit.[3] Moreover, no other court has mentioned these "amendments" for several years. This argument is also entirely specious.

What happened is this: The district court dismissed Brinson's first habeas petition, without prejudice, on September 22, 1997. After the state courts denied relief, Brinson returned to federal court and filed a new petition, with a new docket number, in 2000. The new petition was assigned to a Magistrate, who concluded that it was time-barred, and issued a Report and Recommendation to that effect on June 19, 2001. In response, Brinson filed objections with the district court; but he *also* filed a motion for leave to amend his 1997 petition. This was just a different way of posing the same issue – if the Magistrate was correct about the time-bar, then the amendments would also be untimely.[4] Brinson's attempt to amend was also

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[3] In fact, in his principal brief before the Court of Appeals, Brinson even conceded that his attempt to amend the 1997 petition was improper: "Although he cannot relate his second pro se habeas petition back to his first pro se habeas petition ... [Brinson's] case is uniquely suited to equitable tolling ..." Brief for Appellant, Nos. 02-4466 and 02-4479, at 57. He abruptly changed tactics in his reply brief, where he made the present "res judicata" argument for the first time. By that point, of course, it was too late for the Commonwealth to respond, and the Third Circuit did not address this new theory.

[4] See Mayle v. Felix, 125 S. Ct. 2562, 2574-75 (2005) (amended habeas petition cannot "relate back" to original filing date so as to satisfy AEDPA deadline, where amendments plead new facts or law); U.S. v. Duffus, 174 F.3d 333, 337 (3d Cir. 1999) (same). Brinson's proposed "relation back" is even more problematic, because Brinson's first petition was *dismissed*; at the time of his *(continued ...)*

confusing and improper, because he was already litigating the new petition that contained the very same claims – this was simply duplicative litigation.

In any event, the district court decided the timeliness issue on October 2, 2001, concluding: "I am satisfied that petitioner has established a right to equitable tolling of the AEDPA limitations period *and/or that the present petition for habeas corpus should be deemed to relate back* to the filing date of the first federal petition, March 10, 1997." Brinson v. Vaughn, No. 00-6115 (E.D. Pa. October 2, 2001), Slip Op. at 6-7 (emphasis added). This is the very timeliness issue that the Commonwealth eventually appealed to the Third Circuit, and which is now before this Court.

Brinson's "res judicata" argument thus makes little sense. The timeliness issue has not ever been waived. There is no logical principle that would preclude this Court from reaching the issue.

IV. The Third Circuit's failure to consider Brinson's failure to act diligently is more than a minor factual quibble.

Brinson insists that the Commonwealth's complaints are minor, factual, and incorrect – certainly not worthy of *certiorari*. His arguments, however, are misleading.

A. The Third Circuit specifically refused to consider whether Brinson acted diligently in his return to state court.

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motion to amend, there was nothing pending to "relate back" to, as Brinson conceded in his opening brief before the Court of Appeals. See *supra* n. 3.

Brinson constructs an elaborate argument that the Third Circuit actually *did* examine Brinson's diligence, and merely rejected the Commonwealth's proposed "*per se*" rule that all habeas petitioners who wish to exhaust additional claims in state court must do so within a specific amount of time. Response at 25-28. This argument might be worth debating, if it were true; but it is not true.

The Commonwealth argued below that Brinson had not acted with diligence in his return to state court. As a guideline, the Commonwealth noted the Third Circuit's rule that 30 days is a reasonable time for initiating such litigation.[5] The Commonwealth also pointed out that the Pennsylvania statutory deadline for collateral petitions based on "new facts" is 60 days, so allowing more than that for equitable tolling purposes would be difficult to reconcile with state law. But because Brinson took *five times longer* to file his second state collateral petition, he was not conceivably entitled to equitable tolling. This is common sense. The Third Circuit, however, refused even to consider these arguments: "[Brinson] had no obligation to file in state court *at all*. Consequently, he cannot be faulted for failing to file such a petition within any of the time periods suggested by the Commonwealth." App. 18 (emphasis in original).

Simply put, that amounts to a refusal to apply the reasonable diligence standard to Brinson. That is a clear, important mistake that is worthy of *certiorari*.

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[5] See Crews v. Horn, 360 F.3d 146, 154 (3d Cir. 2004). This same guideline was cited with approval by this Court in Rhines v. Weber, 125 S. Ct. 1528, 1535 (2005).

B. When Brinson finally returned to state court, his late second petition for collateral review did not rely on "new" evidence from his own case. Brinson's excuse for his delay in returning to state court is that he was busy collecting evidence about the race of prospective jurors in his own case, and then he "confirmed" it for accuracy. As soon as he was sure about these facts, he says, he filed his second petition for collateral review.

Once again, this is not true, or at least it is not what he told the state courts. Brinson told the state courts that the "new" information came from other cases, not his own. App. 74-75. This is a fact; it is part of the record.[6]

The Third Circuit uncritically accepted Brinson's story without meaningful examination, probably because the court considered all of this to be irrelevant. Indeed, the court did not discuss Brinson's explanation *at all* during its discussion of equitable tolling, instead concluding that *it did not matter* how long Brinson took to file in state court. App.

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[6] The exact language in Brinson's late PCRA petition, as he attempted to explain why he missed the state deadline, was as follows:

> Petitioner [Brinson] obviously had knowledge of the peremptory challenges made by Mr. McMahon at Petitioner's trial at the time of the trial in 1986, and the Petitioner first viewed the Mr. McMahon tape in 1997. The statistics regarding Mr. McMahon's exercise of peremptory challenges in other trials, however, were not "discovered" until June 1998.

App. 74.

18.[7] At the very least, Brinson's story must be reviewed carefully in order to justify tolling.

As evidence that he delayed filing in state court because he was collecting evidence about his own case, Brinson repeatedly insists that he eventually *did* make allegations about his own trial in his second state collateral review petition. Response at 30-31. Well, *of course* he made such allegations – that is the whole point of a Batson claim. If there were no error at his own trial, then he would not be entitled to relief. The question is, however, what part of Brinson's claim was *new*, and why did he take so long to collect this information? Brinson admitted to the state courts that the race of potential jurors in his own case was not "new" information, and he tried to excuse his lateness by arguing that it took him time to collect (and "interpret" and "confirm") statistics from *other* cases. App. 74. But that evidence was not necessary to a claim of jury discrimination, and in fact it is irrelevant. McCleskey v. Kemp, 481 U.S. 279, 308-309 (1987) (disapproving of statistical analysis of other prosecutions as method of proving presence of discrimination in a particular case). That is presumably why Brinson has changed his story.[8] As a result, Brinson has no compelling basis for equitable tolling.

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[7] The Third Circuit only discusses Brinson's activities during the ten-month gap in its recitation of the case's procedural history. App. 12-13. This comes well before the court's discussion of equitable tolling. The only explanation given by the court for its tolling decision is that the 1997 petition should never have been dismissed, so Brinson was under no obligation to act diligently. App. 16-18.

[8] Brinson also insists that the district court did not warn him about a possible time-bar problem in state court when it dismissed his first habeas petition. Response at 31 n.21. But the district court *(continued ...)*